

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

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JUN -1 2012

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,)	2 CA-CR 2011-0378
)	DEPARTMENT B
Appellee,)	
)	<u>MEMORANDUM DECISION</u>
v.)	Not for Publication
)	Rule 111, Rules of
ERNESTO CABELLO,)	the Supreme Court
)	
Appellant.)	
_____)	

APPEAL FROM THE SUPERIOR COURT OF PINAL COUNTY

Cause No. S1100CR201001080

Honorable Dwight P. Callahan, Judge Pro Tempore

AFFIRMED

Thomas C. Horne, Arizona Attorney General
By Kent E. Cattani, Joseph T. Maziarz,
and Diane Leigh Hunt

Tucson
Attorneys for Appellee

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Attorney for Appellant

K E L L Y, Judge.

¶1 Appellant Ernesto Cabello appeals from the trial court’s order finding him in violation of the conditions of his probation, revoking probation and sentencing him to a term of imprisonment. He argues his probation officer violated his constitutional right against self-incrimination by requiring that he disclose any contacts with minors and, therefore, the court erred by relying on his admissions of contact to revoke his probation. He further contends the court did not properly weigh aggravating and mitigating circumstances in imposing the prison sentence. For the following reasons, we affirm.

Background

¶2 We view the facts in the light most favorable to sustaining the trial court’s findings. *State v. Vaughn*, 217 Ariz. 518, n.2, 176 P.3d 716, 717 n.2 (App. 2008). Pursuant to a plea agreement, Cabello was convicted of attempted molestation of a child. The trial court suspended the imposition of sentence and placed him on lifetime probation. As a condition of probation, Cabello was prohibited from having contact with minors, and he was instructed to leave immediately if a minor, other than his younger brother, came to his residence. Cabello’s probation officer required him to report any contact with a minor. While on probation, Cabello informed the officer about contact involving three minors at his residence.¹ The state filed a motion to revoke Cabello’s

¹Cabello submitted a note to his probation officer in which he explained that the minor daughter of a family friend had given him a hug and that a two-year old had given him “a hug and a kiss.” He also informed the probation officer that a friend had come over briefly with his minor sister.

probation,² and, following a hearing, the court found Cabello had violated the terms of his probation due to two of the instances of contact he had admitted. It revoked his probation and sentenced him to a ten-year term of imprisonment. This appeal followed.

Discussion

¶3 Cabello first argues his constitutional right against self-incrimination was violated by the probation requirement that he disclose prohibited contact with minors and, therefore, the trial court erred by using these admissions to find he had violated the terms of his probation. Cabello concedes he did not raise this issue below, and he has forfeited review for all but fundamental, prejudicial error. *See State v. Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d 601, 607 (2005). Fundamental error requires the defendant to establish: (1) that an error occurred; (2) that the error was fundamental; and (3) that the error resulted in prejudice. *See id.* We find no error, let alone fundamental error.

¶4 The constitutionally protected right against self-incrimination “privileges [a defendant] not to answer official questions put to him in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings.” *Lefkowitz v. Turley*, 414 U.S. 70, 77 (1973). Cabello relies on *State v. Eccles*, 179 Ariz. 226, 877 P.2d 799 (1994), and *Jacobsen v. Lindberg*, 225 Ariz. 318, 238 P.3d 129 (App. 2010), to advance his argument that this privilege was violated by the

²In addition to the allegations of contact with minors, the state alleged that Cabello had “minimiz[ed] his behaviors regarding [the] contact” and had failed a polygraph examination.

trial court's use of his admissions.³ But these cases are inapposite because the contact Cabello acknowledged was not criminal in nature.

¶5 In *Eccles*, our supreme court held that the state cannot impose waiver of the privilege against self-incrimination as a condition of probation. 179 Ariz. at 228, 877 P.2d at 801. We restated this holding in *Jacobsen*. 225 Ariz. 318, ¶ 6, 238 P.3d at 132. But Cabello had no such condition on his probation. Additionally, the *Eccles* court made clear that, while a defendant's probation may not be revoked for a valid assertion of his right against self-incrimination, he "must truthfully answer all questions that could not incriminate him in future criminal proceedings." 179 Ariz. at 228, 877 P.2d at 801. And a probation revocation proceeding is not a criminal proceeding. *Id.* at 228 n.1, 877 P.2d at 801 n.1.

¶6 Further, as the state correctly notes, the United States Supreme Court has addressed the situation where a probationer admits violations of residential restrictions. *Minnesota v. Murphy*, 465 U.S. 420, 435 n.7 (1984). Because a revocation hearing is not a criminal proceeding, the Court explained that such admissions are not incriminating and are not, therefore, subject to the privilege. *Id.* Accordingly, the trial court did not err by relying on Cabello's admissions of prohibited contact.

¶7 Cabello further asserts the trial court erred in balancing the mitigating and aggravating factors at sentencing. But Cabello did not raise this issue below, so he has forfeited the right to seek relief for all but fundamental, prejudicial error. *See Henderson*,

³To the extent Cabello ties this argument to the use of statements resulting from polygraph testing, we do not address it because the court did not revoke his probation on such grounds.

210 Ariz. 561, ¶¶ 19-20, 115 P.3d at 607. Furthermore, because he does not argue on appeal that the error is fundamental, and because we find no error that can be so characterized, the argument is waived. *See State v. Moreno-Medrano*, 218 Ariz. 349, ¶ 17, 185 P.3d 135, 140 (App. 2008) (fundamental error argument waived on appeal); *State v. Fernandez*, 216 Ariz. 545, ¶ 32, 169 P.3d 641, 650 (App. 2007) (court will not ignore fundamental error if it finds it).

Disposition

¶8 The trial court's findings, revocation of Cabello's probation, and sentence imposed are affirmed.

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge

CONCURRING:

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Presiding Judge

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Judge